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adequate to prevent her encountering a sailing vessel. She is regarded in the regulations of the Trinity House, which have been adopted in this court, as a vessel with the wind free; but she is more than this. The force which moves her is governed by her own will. She determines for herself what shall be its direction and intensity at the moment; and she is at rest when the engineer commands. There is no hardship for her therefore, in the rule that requires her to give way to a sailing vessel, and the safety of navigation on our river, makes it a duty of this court to enforce it rigidly.

In the case before us, the libel against the John W. Gandy must be dismissed, with costs; and a decree must be entered against the steamer Eagle for the amount of damages sustained by the other vessel in the encounter, also with costs.

Decree accordingly, and reference to Mr. Commissioner Heazlitt, to assess the damages.

Mr. B. Gerhard, for the Eagle.

Mr. G. M. Wharton, for the Gandy.

*In the Supreme Court of Pennsylvania. At Philadelphia,
January, 1859.*

MERCHANTS' INSURANCE COMPANY OF PHILADELPHIA vs. ALGEO.¹

1. A voyage that is insured, must be so conducted as not to change the risk insured against. If the usual mode, or the agreed mode of conducting it be changed, without a necessity arising from a danger insured against, the risk is changed.
2. When a party gets insurance on a voyage to be conducted in a prescribed mode, he must be understood as stipulating that that mode is practicable and shall be followed. If then the voyage in that mode is not practicable, at a certain stage of water, he has no insurance when attempting it at that stage.
3. The insured has no right to change the terms of the policy by choosing to start at a time that makes the change necessary. A change from necessity is one arising from a cause discovered after the commencement of the voyage.

Error to the District Court of Allegheny County.

This was an action of covenant by John Algeo & Co., against the Merchants Insurance Co., of Philadelphia, on a policy of insur-

¹ We are indebted to the Pittsburgh "Legal Journal" for this case.—*Eds. Amer. Law Register.*

ance, in \$6,000, upon a cargo of ice, in four ice boats, from Freeport, Pa., to Nashville, Tenn., to be brought down to Pittsburgh by sweeps, and to be towed *thence* by steamer—being to amount of \$1,500 on each boat, separate insurance.

On the 8th of April, 1856, the boats started from Freeport, and instead of being taken in tow at Pittsburgh, were run past that city and also past the Saw Mill Run landing, and to a point called the Pork House, at the lower end of Manchester, three miles below Pittsburgh, where, in attempting to land, one of the boats was lost. The reason given for not taking the tow at Pittsburgh, as required by the terms of the policy, was, that the stage of water was such (about 12 feet,) as to make it very hazardous to land the boats there for that purpose; and therefore, the resolution had been taken before leaving Freeport to run to the Pork House with the sweeps.

The defendants contended *inter alia*, that the terms of the policy relating to the mode of conducting the voyage from Freeport to Pittsburgh, and thence onward, constituted a warranty, and that plaintiffs, not having complied with the warranty, in the absence of valid excuse therefor, could not recover; that matters of excuse, for said non-compliance, must be such as arose after commencement of the risk; and that the plaintiffs having determined before the commencement of the voyage to land where they did land, the risk never attached.

The Court (Williams, P. J.) instructed differently, and the jury found for plaintiffs \$1,688 and costs. Whereupon defendants took this writ of error, and assigned as error the refusal to charge in favor of defendant's positions as above stated.

Knox and *G. P. Hamilton*, for plaintiffs in error, cited Phillips on Insurance, sec. 750; *De Ham* vs. *Hartley*, 1 T. R. 243; *Blackhurst* vs. *Cockell*, 3 T. R. 360; 3 Dow, 255.

Marshall and *Brown*, for defendants in error, cited Phillips on Insurance, sec. 762, 770-1-3, 782, 119, 133; *Cochran* vs. *Fisher*, 1 C. M. & R. 809; *Eyres* vs. *Insurance Co.*, 5 W. & S. 116, 123. Philadelphia, by

The opinion of the court was delivered January 3, 1859, at LOWRIE, C. J.—A voyage that is insured must be so conducted

as not to change the risk insured against. If the usual mode, or the agreed mode to conducting it be changed without a necessity arising from a danger insured against, the risk is changed.

The agreed mode of conducting this voyage was changed by running the boats with sweeps to the lower end of Manchester, instead of to Pittsburgh. Did it appear that this change was necessary in order to escape a danger insured against? We think not.

When the plaintiffs below got insurance on a voyage to be conducted in a prescribed mode, we must understand them as stipulating that that mode was practicable and should be followed. If, therefore, the voyage in that mode was not practicable, with a twelve feet stage of water, they had no insurance when attempting it at that stage; and they passed Pittsburgh, not to escape a danger insured against, but because they started at a time when performance of the agreed conditions of the voyage were impracticable.

If the voyage in the agreed mode was, as we presume, practicable with any other stage of water, they were bound to start with such a stage, or give up their insurance by changing the risk agreed upon. Stopping at Pittsburgh and going in tow from that place, were essential parts of the voyage as agreed to be conducted, and this was prevented by intentionally starting with a stage of water that made it impracticable. The plaintiffs had no right to change the terms of the policy, by choosing to start at a time that made the change necessary. A change from necessity is one arising from a cause discovered after the commencement of the voyage.

In a short voyage like this (about four hours,) the plaintiffs are charged with knowledge of the difficulties of the navigation, and their own proof shows that they did know them, and that on account of them, they did not intend to stop at Pittsburgh. They started under a risk not insured against, and for this they changed the form of their voyage; and it follows, that the insurance never attached to this boat; and the plaintiffs might have been nonsuited on their own evidence. Under the circumstances of the case, the court ought to have affirmed the defendant's seventh proposition.

Judgment reversed, and a new trial awarded.